IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 3716 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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REGIONAL DIRECTOR - Appellant(s)
Versus
KARUNAKARAN CHINDRAN - Defendant(s)

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Appearance :

MR HEMANT S SHAH for Appellant(s) : 1,
MR HR SOLANKI for Defendant(s) : 1,
MS KH VISHWAS for Defendant(s) : 1,
MR RH SOLANKI for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 16/07/2007

ORAL JUDGMENT

Regional Director, Employees State Insurance Corporation, Ahmedabad, appellant, original opponent,

has filed this appeal against the judgement and order dated 12.7.2005 passed by the learned Judge, Employees' State Insurance Court, Ahmedabad, in EI Second Appeal No. 41 of 2003 in M.A.T. Appeal No. 60 of 2001.

2 Heard Mr. Hemant S. Shah, learned advocate for the appellant. When the matter was placed for hearing before this Court, this Court issued notice on 2.2.2007 and further orders were passed on 23.3.2007 as well as 20.6.2007. With consent of the parties, the matter has been taken up for final disposal.

3 The facts giving rise to this appeal are as under:

3.1 It is the case of respondent workman that he was working in Soma Textile, Rakhial Road, Ahmedabad. He is a member of Employees State Insurance Corporation. The appellant's Insurance Policy Number is: 37-142407. He was operating automatic weaving machine in Soma Textile Mill. According to him the noise of the machine was very high. He was working for 8 to 10 hours daily. According to him since he was operating on the machine for about 8 to 10 hours, because of very high noise of the machine, he had developed occupational disease and he was feeling that constant noise is coming out from his ears and he was not feeling well. According to him on the left ear, he was not able to properly hear the voice.

Sometimes, he was not able to hear with his both ears. More or less he has become deaf man. According to the respondent he was working in the Mill since 1.7.1982. He indicated that there is physical disability and is not able to hear and therefore initially when he filed application he was examined by Dr. Bhavin R. Zumkhawala. The said Doctor has examined the respondent on 3.3.2000. After examining the respondent, Dr. Zumkhawala has opined as under:

3.2 “There is loss of pneumatisation with sclerosis seen in both mastoid suggest changes of mastoidities. Changes are more marked on the left side.”

3.3 According to the Doctor the respondent is not able to hear properly and it has created complete deafness in both the ears.

3.4 Being aggrieved and dissatisfied with the order, the respondent filed appeal before the Medical Appellate Tribunal at Ahmedabad being Appeal No. 60 of 2001. Before the Medical Appellate Tribunal Dr. P.L. Shah, (Cons. Surgeon); Dr. V.I. Patel, M.S. (Gen. Surgeon); Shri Manharlal T. Shukla and Shri Ajitkumar U. Khanderia, were assessors. However, one of the doctors Dr. V.I. Patel was not present before the Medical Board. The respondent had stated that he had complete deafness and therefore determination of 4% by Dr. Bhavin R. Zumkhawala is not correct. In the appeal also the respondent was examined by one

Doctor. As per the medical Board there was partial deafness taking into consideration the loss sustained by the respondent and set aside the disability of 4% and held the disability of the respondent workman now to be recommended to 8%. The said order was passed on 28.6.2001.

3.5 Being aggrieved and dissatisfied with the said order, Second Appeal was filed being Appeal No. 41 of 2003. In the appeal it was contended that still there is a deafness by the respondent as he has constant headache and he is not able to carry out any work. The Second Appeal was filed on 1.5.2002. Thereafter, the said appeal numbered as Second Appeal No. 41/2003 and the said matter was heard by the learned Judge. Before the learned Judge the respondent claimed 100% deafness. The learned Judge held that the respondent has developed occupational disease. According to the learned Judge the disability determined at 8% is not correct. The Medical Board has not given more reasoning to arrive at the said conclusion. According to the learned Judge as the respondent has developed complete deafness, the Tribunal has stated that there is increase of occupational disease and therefore 12% disability was awarded. Ultimately, the Tribunal by its order dated 12.7.2005 was pleased to increase disability from 8% to 12%.

4. Being aggrieved by and dissatisfied with the said order Mr. Hemant Shah, learned advocate for the

appellant Corporation, appears. He has stated that the Lower Court has erred in considering that the opponent has sustained disability to the extent of 12% which is contrary to law and evidence on record. According to him the lower Court has no jurisdiction to decide the issue of disability which was decided by the Medical Appellate Tribunal and Medical Board considering the disability at 8% in accordance with the rules and evidence on record and increase it to 12%.

4.1 I have gone through the judgement of the learned Judge. On behalf of the respondent, the learned advocate has tried to support the judgement. I have also gone through the evidence on record when the workman was working in the Mill right from 1982. Certificate was obtained on 23.1.2001 where disability was assessed at 4%. When the workman was examined again, the disability was determined at 8% whereas the Court decided the matter in July, 2005 after going through the report when the Court was of the view that the respondent has claimed 100% deafness and he is not able to hear anything. In view of the evidence produced by the respondent workman, the learned Judge has increased the disability from 8% to 12%.

4.2 Being aggrieved by and dissatisfied with the said order of the learned Judge, the appellant has filed this Appeal before this Court under Section 82 read with Section 54(A) of the E.S.I. Act, 1948. I

have gone through Section 54(A) of the Act which reads as under:

> “54A – References to medial boards and appeals to medical appeal tribunals and Employees' Insurance Court – (1) The case of any insured person for permanent disablement benefit shall be referred by the Corporation to a medical board for determination of the disablement question and if, on that or any subsequent reference, the extent of loss of earning capacity of the insured person is provisionally assessed, it shall again be so referred to the medical board not later than end of the period taken into account by the provisional assessment.”

4.3 The learned advocate for the appellant has relied on the decision of this case in the case of Mohd. Abdulla Vs. E.S.I. Corporation reported in 1984 Lab. I.C. 1773 particularly paragraph No. 11 on page 1777 where this Court has held as follows:

4.4 > “In my view, the lower Appellate Judge has not correctly approached the problem. When he realised that the findings of the Medical Board and the Medical Appeal Tribunal were not satisfactory and rationally based, he should have on his own accord remanded the matter for further elucidation by either or both of these Tribunal. It is not a correct

> approach to accept the findings although they appeared to be erroneous only on the ground that the appellant has not led any medical evidence on the point. It is clear from the judgement of the lower Appellate Judge that even without the assistance of a medical witness examined by the appellant, it did appear to him that the reports of the statutory authorities were not satisfactory and if so how could he have agreed with it only because the appellant had not examined a medical witness in his support.”

5. In my view after going through the evidence on record when the Tribunal has held that respondent has suffered 12% disability, the same is a discretionary order. The said order does not call for interference by this Court.

5.1 I have also gone through Section 82 of the ESI Act particularly sub-section (2) which provides that an appeal shall lie to the High Court from an order of the Employees Insurance Court if it involves a substantial question of law. This Court is of the view that the trial Court has increased disability from 8% to 12%. There is no substantial question of law involved in the appeal. The trial Court has passed discretionary order and under Section 54A of ESI Act the Court has power to increase disability

from 8% to 12%.

5.2 The learned advocate for the appellant has relied on the decision of this Court in First Appeal No. 2660 of 1996 decided on 24.2.1999. The said decision does not help the case of the appellant.

The appeal is therefore dismissed.

(K.M. MEHTA, J)

(pkn)